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CALIFORNIA WATER NEWS

GOVERNOR NEWSOM ISSUES NEW EXECUTIVE ORDER PARTIALLY LIFTING DROUGHT DECLARATIONS AND WITHDRAWING WELL PERMIT REQUIREMENTS FOR COUNTIES

On September 5, 2024, Governor Gavin Newsom issued an Executive Order (N-3-24) to terminate the drought State of Emergency declaration for 19 counties in light of improved conditions. The Executive Order also rescinds certain provisions from prior drought State of Emergency Proclamations and Executive Orders, including the requirement for counties to obtain verifications and make findings regarding proposed groundwater wells before issuing permits. Despite improvements to overall surface water supplies, groundwater basins have been slower to recover and a drought State of Emergency remains active in certain vulnerable watersheds. Finally, the Executive Order narrows the State of Emergency Proclamations and Executive Orders targeting the flood effects caused by 2023 winter storms.

Background

The California Legislature has empowered the Governor to issue emergency proclamations and executive orders under the California Emergency Services Act during specified conditions. The Governor utilizes those emergency powers to carry out the state's:

> . . .responsibility to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to the life, property, and resources of the state and generally to protect the health and safety and preserve the lives and property of the people of the state. (Gov. Code, § 8550.)

Pursuant to this power, the Governor can "make, amend, and rescind orders and regulations necessary to carry out the provisions" of the California Emergency Services Act and those orders and regulations have the force and effect of law. (Gov. Code, § 8567.)

The current multi-year drought began in October of 2019, just three years after the drought of 2012-2016. (*See* Executive Order N-3-24, at p. 1.) Through a series of declarations in 2021, the Governor proclaimed a drought State of Emergency in all 58 counties to increase flexibility, set conservation goals, and bolster California's response capabilities. (*See* Executive Order N-3-24 at p. 1.)

Drought conditions continued through Water Year 2023, when cool and wet conditions resulted in record Sierra snowpack and the reemergence of Tulare Lake. (*See* California-Nevada Drought Status Update, National Integrated Drought Information System (Oct. 19, 2023).) Notably, the California-Nevada region started Water Year 2023 with 100 percent of the region in drought, but concluded with less than 1 percent in drought, according to the U.S. Drought Monitor. (*Id.*)

The drastic changes in hydrology during Water Year 2023 and resulting floods prompted a new slate of emergency proclamations and orders throughout the year to address the impacts of the early 2023 winter storms in the Tulare Lake Basin and other regions, even while the drought state of emergency remained in effect. (*See* Executive Order N-3-24 at p. 2.)

Executive Order N-3-24

Considering the reduction in drought conditions since Water Year 2023 and the improvements in areas impacted by the late winter storms of 2023, Executive Order N-3-24 terminates the drought State of Emergency in the Counties of Imperial, Inyo, Los Angeles, Marin, Mendocino, Mono, Monterey, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Sonoma, and Ventura.

The drought State of Emergency remains active in the 39 other counties, given the persistence of significant impacts from the multi-year drought such as including depleted groundwater supplies, domestic well insecurity, and harm to native fish populations. Executive Order N-3-24 calls for continued action by the state to address the ongoing effects of drought in the Sacramento and San Joaquin River basins, the

Tulare Lake Basin, the Shasta, Scott, and Klamath River Watersheds, and the Clear Lake Watershed. Though the Executive Order does not fully terminate the drought State of Emergency in the remaining 39 counties, it narrows or rescinds specific provisions of prior orders that are no longer necessary. Keeping the State of Emergency active in these counties allows the Office of Emergency Services to continue providing disaster assistance funding when needed.

The new Executive Order also withdraws the provisions of prior orders that imposed conditions on counties and other groundwater well permitting authorities. Executive Order N-3-23 restricted approvals of new groundwater well permits or alterations of existing permits for wells located in medium- or high-priority basins subject to the Sustainable Groundwater Management Act (SGMA) without written verification from the respective groundwater sustainability agency that the well would not be inconsistent with the applicable Groundwater Sustainability Plan. (*See* Executive Order N-3-23 at p. 3.) Permitting entities were also barred from issuing a permit for a new or altered groundwater well:

> . . .without first determining that extraction of groundwater from the proposed well is (1) not likely to interfere with the production and functioning of existing nearby wells, and (2) not likely to cause subsidence that would adversely impact or damage nearby infrastructure. (*See id.* at p. 4.)

Counties that had adopted interim procedures to obtain the verification and findings may seek to adjust their procedures with the removal of those requirements.

As to the State of Emergency for the counties impacted by 2023 winter storms, the new Executive Order rescinds provisions deemed no longer necessary, finding that changed conditions "warrant a more targeted emergency response to the effects of those storms." (*See* Executive Order N-3-24, at p.2.)

Conclusion and Implications

Though California has now had two winters with above-average rainfall, the Governor's decision to keep the drought State of Emergency in effect for 39 counties shows the significant and lasting impacts the prior multi-year drought had across the state. Executive Order N-3-24 also highlights the uncertainty of future hydrology, cautioning that wet winters do not necessarily mean another drought is out of the question for California.

A copy of Executive Order N-3-24 is available at: https://www.gov.ca.gov/wp-content/uploads/2024/09/9.4.24-Drought-EO-N-3-24.pdf. (Taylor Strain, Austin Cho)

LEGISLATIVE DEVELOPMENTS

COLORADO RIVER BASIN STATES, CONGRESS EXPLORE VARIETY OF PROGRAMS TO ADDRESS WESTERN WATER NEEDS

The federal government, through Congress and the U.S. Bureau of Reclamation, proposed two new water programs in September 2024. The first, the Water Project Navigators Act, would see Congress create a new program within the U.S. Bureau of Reclamation to help communities access federal monies for water conservation and infrastructure projects. The second, a conservation-for-credit agreement between the Upper Colorado River Basin States and the Bureau of Reclamation, would offer a way for the Upper Basin states to benefit from their internal voluntary water conservation measures. Both programs offer new ways to build on existing programs to further a common goal of sustainable water use in the West.

The Water Project Navigators Act

A bi-partisan group of legislators recently introduced the Water Project Navigators Act in an effort to support development of water management and conservation programs throughout the West. The Act, sponsored by Sens. John Hickenlooper (D-CO) and Jerry Moran (R-KS) and Reps. Brittany Petterson (D-CO) and Juan Ciscomani (R-AZ) would create a mechanism to help states, tribes, and rural communities access federal resources for water-related projects. The federal government currently has numerous programs that offer grant and low-interest loan funding to support high-needs communities and projects. Some examples of these programs include the USDA Rural Development Water and Environmental grants and loans, and the Bureau of Reclamation WaterSMART water and energy efficiency grants. However, many communities, particularly rural and Tribal communities, often struggle to have the means to access this money. In a press release, Sen. Hickenlooper noted that, "Rural and tribal communities deserve their fair share of federal funds to address drought, but all too often are left out. Our water project navigators will help these communities get their share."

To accomplish this goal, the Act would create "Navigators" under the Bureau of Reclamation to assist and guide communities through the application and acquisition process to obtain federal funds. Specifically, the Navigators would be tasked with grant writing, project management, and technical assistance, including design, environmental review, and engineering. The program is modeled in part after Colorado's Federal Technical Assistance Grants and the Colorado River Water Conservation District's Accelerator Grant Program. These programs, although limited in scope to certain Colorado communities, have shown success and offer, as Sen. Moran said, a way to "connect these communities with the resources available to them to help combat the impacts of drought."

The bill sponsors' press releases states that the primary goals of the Navigator program are to help communities develop and implement multi-benefit water projects, and to accelerate the creation of those projects that support water supply and sustainability goals. Although a wide variety of entities would be eligible for Navigator support, the primary focus will be on rural and Tribal communities that do not have the resources or technical expertise to implement their water-related projects on their own.

In addition to strong bipartisan support, the bill is supported by a variety of conservation and agricultural groups including Trout Unlimited, American Rivers, Environmental Defense Fund, Nature Conservancy, Rocky Mountain Farmers Union, and the Kansas Department of Health and Environment. Rep. Ciscomani said, "[a]s the drought worsens in the West, it is now more important than ever that impacted communities have the necessary tools to secure federal dollars for critical multi-benefit water infrastructure projects."

There are currently two versions of the bill pending in the Senate. Senate Bill 5014 is in the Committee on Energy and Natural Resources Subcommittee on Water and Power, while Senate Bill 4995 is in the Senate Committee on Environment and Public Works. The companion House Resolution 9506 is before the House Committee on Natural Resources.

Water Conservation Credits

Outside of Congress, the Upper Colorado River Basin states are working with the Bureau of Reclamation on an agreement that would allow states to obtain credits for conserved water that could then be used to protect against potential future cutbacks. Water conservation measures are currently the hot-button issue in the Colorado basin as dry years and overuse have combined to severely deplete storage reservoirs, most notably Lake Powell and Lake Mead. All seven basin states have been working with the Bureau of Reclamation on proposals for operation during times of shortage. *See, Upper and Lower Colorado River Basin States Submit Competing Proposals for Post-2026 Operational Guidelines*, 28 W. Water L. & P'lcy Rptr. 129-131(Apr. 2024). However, in the interim many Upper Basin States have already enacted programs to reduce their water usage. For example, Colorado's System Conservation Pilot Program is a demand management program that pays water users to fallow their fields for a season and keep that water in the river. In 2023 alone that program paid $16 million to farmers and ranchers to not use their water. Although generally seen as a conservation success, the Upper Basin states are worried that there is not a central mechanism to track and store that water. Instead of refilling the large downstream reservoirs, that water could simply flow to the lower basin for consumption, thereby derailing the goals of the program.

To combat that issue, the Upper Basin states proposed an agreement with the Bureau of Reclamation under which those states would track their conserved water as "storage credits." If and when severe drought forces basin-wide curtailment, the Upper Basin could then use those credits to fulfill their water delivery obligations to the Lower Basin. In essence, the Upper Basin would no longer be penalized if the Lower Basin used the "saved" water during non-curtailment periods. The Bureau of Reclamation is currently drafting a conservation-for-credit agreement that it will then present to the Upper Colorado River Commission. The agreement is expected to specify which conservation programs are eligible for credits, who can participate in the credit program, and how the credits would be regulated, including measurement and calculations.

The parties stated a goal to have a draft agreement by the end of September, although no agreement was publicly available as of press time. The Upper Colorado River Commission said in a statement that it hopes to approve the agreement in time to operate conservation projects during the 2025 water season.

Conclusion and Implications

Although the conservation-for-credit and Water Project Navigators Act are seemingly disparate, they share an underlying theme. Extended drought and changing climate are overriding partisan divides and forcing cooperation among western shareholders. Any long-term western water solution will likely be multi-faceted and involve both infrastructure improvements and voluntary water curtailment. Creative ideas, like those outlined above, offer an optimistic view of the future of water in the West. There may be no magic bullet, but legislators, states, quasi-governmental organizations, and private parties are all working together to attack the growing challenges and find solutions for the 21st century.
(John Sittler)

CALIFORNIA PASSES LEGISLATION FOR CHALLENGES TO PROPERTY-RELATED FEES

The California legislature recently passed Assembly Bill 2257 (AB 2257). This bill affects administrative remedy challenges to property-related fees, including water or sewer fees.

Background

On August 27, 2024, the California legislature passed AB 2257. The bill was submitted by Assembly Member Lori Wilson and sponsored by the Association of California Water Agencies. The bill would require ratepayers to participate and raise specific objections to proposed rate changes before resorting to litigation after the new rates are approved. The bill would also provide an opportunity for local agencies and ratepayers to resolve objections during the public process and avoid surprise litigation down the road. AB 2257 builds on California Proposition 218 by including an exhaustion of administrative remedies requirement for Proposition 218 challenges to property-related water or sewer fees or charges. The bill requires parties interested in challenging a fee under California Constitution Article XIII D (created and modified by Props 218) to submit written objections to the agency that passed those fees. The bill was submitted to Governor Newsom on September 5, 2024, and signed later that month.

Proposition 218

Proposition 218 is designed to ensure that all taxes and most charges on property owners are subject to voter approval. Proposition 218 was developed in the aftermath of Proposition 13, which constrained local governments' ability to raise property taxes. Proposition 13 also specified that any local tax imposed to pay for specific governmental programs—a "special tax"—must be approved by two-thirds of the voters. This led local governments to rely more upon other revenue streams to fund local services such as assessments, property-related fees, and a variety of small general purpose taxes. These local revenue tools became the focus of Proposition 218.

Under Proposition 218, local governments may not tax or charge local property owners with these revenue tools without obtaining voter approval and following a specific set of steps. For example, in order to impose or increase a tax under Proposition 218, the local government would need to: (1) ensure that general taxes are approved by a majority vote of the people, (2) the election for general taxes be consolidated with a regularly scheduled election for members of the local governing body, and (3) any tax imposed for a specific purpose be treated as a "special tax" even if the funds are placed into the community's general fund. In short, Proposition 218 curbed local governments' ability to impose assessments, property-related fees, and other taxes on property owners.

Purpose of AB 2257

AB 2257 builds on California Proposition 218 by including an exhaustion of administrative remedies that Proposition 218 requires for challenges to property-related water or sewer fees or charges. The purpose of the act is also to provide an opportunity for the local public agency to address or resolve the objection or objections before its governing body makes a final decision on whether to establish a new, or amend a current, property-related fee or special assessment pursuant to Proposition 218. The procedure created by AB 2257 is meant to provide an opportunity for a ratepayer to present an objection to a proposed new or amended property-related water or sewer fee or charge, or any special assessment, and allow the local agency the opportunity to resolve the objection, before resorting to litigation after the new or amended rate or special assessment is approved. Even if such an objection is not fully resolved, the local agency considering and responding to the objection can narrow the dispute and create a more robust evidentiary record for court review in deciding any later litigation.

Potential Effects of AB 2257

AB 2257 creates a procedure for submitting and reviewing challenges to fees or assessments proposed by local governments. First, under AB 2257, a ratepayer or entity is prohibited from alleging noncompliance with the constitutional provisions for any new, increased, or extended fee or assessment unless that ratepayer or entity has timely submitted to the local agency a written objection to that fee or assessment.

The written objection must specify the grounds for alleging noncompliance.

Next, AB 2257 provides that local agency responses to the timely submitted written objections shall go to the weight of the evidence supporting the agency's compliance with the substantive limitations on fees and assessments imposed by the constitutional provisions. This means that the agency's responses will be taken as evidence in support of their compliance. AB 2257 would also prohibit an independent cause of action as to the adequacy of the local agency's responses.

Further, AB 2257 provides that in any judicial action or proceeding to review or challenge the fee or assessment setting process, the court's review is limited to a record of proceedings containing specified documents.

Conclusion and Implications

AB 2257 builds on California Proposition 218 by including an exhaustion of administrative remedies that Proposition 218 requires for challenges to property-related water or sewer fees or charges. Under AB 2257, ratepayers and entities would need to follow a more strict administrative procedure to challenge property-related fees imposed by local governments. From the perspective of many landowners, AB 2257 may present a more complex and expensive process to challenge rates and fees that are already inherently both complex and expensive under Proposition 218. The applicability of AB 2257 to a particular fee or charge will depend on applicability and the nuances of Proposition 218 and its case law progeny. (Christina Suarez, Derek Hoffman)

WATER RIGHTS PENALTIES ARE SET TO INCREASE SIGNIFICANTLY BY ASSEMBLY BILL 460 IF SIGNED INTO LAW GOVERNOR NEWSOM

California's "hybrid" water rights system is based on the riparian and appropriative doctrines, arising from a long, complex history based in large part on priority of water rights. The appropriative doctrine specifically is premised upon "first in time, first in right," which becomes particularly important during droughts and consecutive dry years that often result in curtailments notices and orders from the State Water Resources Control Board (State Water Board). The State Water Board's existing authority to administer and enforce penalties is about to be enhanced by Assembly Bill 460 (AB 460) allowing higher fines among other powers, unless vetoed by the Governor by September 30.

Background Leading to Assembly Bill 460

California's recent drought resulted in the State Water Board passing emergency regulations including for the Klamath River Watershed (Emergency Regulations), where in 2022, some property owners in Siskiyou County diverted Shasta River water purportedly in violation of the Emergency Regulations. These events gave rise to AB 460 to increase fines for unlawful diversions of water. This bill currently sits on the Governor's desk awaiting signature or veto.

For illustrative purposes to show practically how AB 460 changes imposition of fines, the ranchers involved with the 2022 violations were assessed $4,000 in total, which under AB 460 would equate to over $1.2 million.

What AB 460 changes

AB 460 essentially makes three substantively significant changes to existing law.

First under existing law, the diversion or use of water other than as authorized by specified provisions of law is a trespass, subject to specified civil liability. AB 460 would require the State Water Board to adjust for inflation by January 1 of each year, beginning in 2026, the amounts of civil and administrative liabilities or penalties imposed by the board or in water right actions brought at the request of the board, as specified.

Second, existing law authorizes the State Water Board to issue an order to a person to cease and desist from violating, or threatening to violate, certain requirements relating to water use, including diverting or using water, other than as authorized. Further, upon the failure of any person to comply with a cease-and-desist order issued by the State Water Board,

existing law authorizes the Attorney General, upon the request of the State Water Board, to petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, and authorizes civil penalties for a violation of a cease and desist order, as specified. AB 460 would increase one of the specified civil penalties to $2,500 for each day in which a violation of a cease-and-desist order occurs.

Third and under existing law, a person or entity in violation of a term or condition of a permit, license, certificate, or registration issued by the State Water Board, authorizes the State Water Board to hold a violator civilly liable for an amount not to exceed $500 for each day in which the violation occurs. AB 460 would increase the amount of civil liability for the above-described violations to $1,000 for each day in which the violation occurs. In addition, if the violation relates to a regulation or order adopted by the State Water Board, then that person or entity may be liable in an amount not to exceed $10,000 for each day in which the violation occurs, and $2,500 for each acre-foot of water diverted in violation of the curtailment order, beginning on the first day on which the violation occurs.

Conclusion and Implications

Water rights and related priorities are of paramount importance for helping to ensure the "rules" are followed. Sometimes The Legislature established penalty amounts for most water right violations in the late 1980's. These penalties have not increased since then, and it has been alleged that some water diverters believe that paying the penalties associated with violating water right terms or an order or regulation of the State Water Board are merely a "cost of doing business." Increased penalty amounts may serve to provide a stronger deterrent to such behavior. The State Water Board could have referred this matter to the Attorney General in order to seek a temporary restraining order or preliminary injunction to halt illegal activity, but it is unclear how long this would have taken and whether such action would have been fast enough given the underlying violation in Siskiyou County was eight days.
(Wes Miliband)

REGULATORY DEVELOPMENTS

EPA'S FOURTH SIX-YEAR REVIEW OF DRINKING WATER STANDARDS: KEY FINDINGS

In July 2024, U.S. Environmental Protection Agency (EPA) announced the results of the fourth cycle of its Six-Year Review of existing national primary drinking water regulations (NPDWRs). This review process, mandated under the Safe Drinking Water Act (SDWA), occurs every six years. The purpose of the review is aimed at ensuring the safety of drinking water by evaluating existing drinking water standards and determining whether they need updating to reflect new scientific knowledge and technological advancements. EPA's fourth Six-Review report sheds light on the state of drinking water safety, but did not lead to any proposed regulatory changes.

Background on the Six-Year Review Process

The Six-Year Review process is designed to ensure that drinking water standards remain effective in protecting public health. Under the SDWA, EPA is required, every six years, to review each NPDWR, which are legally enforceable primary standards and treatment techniques that apply to public water systems. This process involves a thorough assessment of current standards, incorporating the latest scientific data, technological advances, and any emerging health concerns. The Six-Year Review is not a final regulatory decision to revise or not revise an NPDWR, but rather the initiation of a planning process that involves more detailed analyses of factors relevant to deciding whether a rulemaking effort to revise an NPDWR should be considered.

During each review cycle, EPA's evaluation involves, but is not limited to, the following:

- Contaminant Occurrence and Exposure Analysis: Information on the frequency, levels, and geographic distribution of contaminants is analyzed to determine how changing a maximum contaminant level (MCL) or required treatment technique may affect health risks of water consumers and impact compliance costs for public water systems.

- Technological Advancements: Consideration of advancements in water treatment and monitoring technologies.

- Analytical Method Improvements: Evaluated to determine whether there have been advances in laboratory technology to potentially enable a revision to the MCL for a regulated contaminant.

- Risk-Balancing: Addresses whether a change to an MCL and/or treatment technique will affect the risk from one or more other contaminants, and, if so, to consider revisions that will balance these overall risks.

- Implementation Issues: Considered based upon EPA's or states' experience in implementing the regulations as written.

The findings from these reviews can lead to updates in regulations, new rulemakings, or reaffirmation of existing standards.

Key Findings from the Fourth Six-Year Review

Of the 88 NPDWRs assessed during the fourth Six-Year Review 4, EPA did not identify any that needed revision at this time. The review did identify areas where updates may be warranted. For example, EPA noted that it did not evaluate lead and copper in this Six-Year Review because such efforts would duplicate efforts to review those NPDWRS as part of an ongoing regulatory action in which EPA has proposed to, among other thing, require water systems to replace lead service lines, remove the lead trigger level, reduce the lead action level to 0.010 mg/L, and strengthen tap sampling procedures.

In addition to possible revisions to maximum contaminant level goals (MCLGs), MCLs, and treatment techniques (TTs), as a part of the Six-Year Review, EPA considered whether other regulatory revisions to NPDWRs were needed to address implementation

issues, such as revisions to monitoring and system reporting requirements. The agency focused on the following five implementation issues in this Six-Year Review:

- Use of an alternative MCL for nitrate in Non-community Water Systems (NCWSs)
- Frequency of nitrate monitoring in Transient Noncommunity Water Systems (TNCWS)
- Frequency of nitrite monitoring
- Total nitrate-nitrogen plus nitrite-nitrogen MCL
- Total cyanide screening for free cyanide

Although the results from this review did not warrant any changes at this time, EPA noted it would consider changes to monitoring requirements in the future. Regarding nitrate monitoring requirements, EPA intends to work with States to encourage more systems to sample for nitrite at least once during each nine-year compliance cycle.

Notably, EPA did not include in this Six-Year Review cycle the recently promulgated per-and polyfluoroalkyl substances (PFAS) regulations. The PFAS regulations, promulgated in April 2024, established six new NPDWRs. EPA anticipates that once the PFAS regulations go into effect and sufficient information regarding compliance monitoring becomes available, those NPDWRs will be subject to a more detailed regulatory review under a future Six-Year Review cycle.

Conclusion and Implications

EPA's fourth Six-Year Review of drinking water standards is a critical step in maintaining and improving the safety of the nation's water supply. By integrating the latest scientific research, technological advancements, and public health considerations, the review highlights areas where regulatory updates are needed and provides a roadmap for future actions. While this review did not result in any concrete recommendations for future revisions, there are a number of current proposed regulatory changes relating to water quality standards that are important to follow. For more information, *see*: https://www.epa.gov/dwsixyearreview/six-year-review-4-drinking-water-standards

(Monica Browner, Meagan J. Somogyi, Breana Inoshita)

STATE WATER BOARD DESIGNATES PROBATIONARY STATUS FOR THE TULE SUBBASIN

On September 17, 2024, the State Water Resources Control Board (State Water Board) held a public hearing on whether to designate the Tule Subbasin as probationary under the Sustainable Groundwater Management Act (SGMA). SGMA authorizes the State Water Board to put a basin on probationary status and intervene if it determines the local Groundwater Sustainability Agency (GSA) is not adequately managing groundwater. In the case of the Tule Subbasin, the State Water Board adopted an August 2024 staff report (Final Staff Report) recommending probation on the basis that the six Groundwater Sustainability Plans (GSPs) submitted for the basin would not prevent undesirable effects from occurring. Beginning January 1, 2025, groundwater users in the Tule Subbasin will be subject to state-imposed metering, reporting, and extraction fees, except for the Delano-Earlimart Irrigation District GSA (DEID) and Kern-Tulare Water District GSA (Kern-Tulare), who were able to show adequate groundwater management within their respective portions of the basin.

Background

In 2014, the Legislature passed SGMA to establish a statewide framework for managing groundwater for the first time in California's history. SGMA prioritizes local control over groundwater management, but allows the state to intervene if the management within a particular basin is inadequate.

Out of the state's 515 groundwater basins, the Department of Water Resources (DWR) identified 94 as medium- or high-priority, based on factors such as projected overlying population growth, the number of public supply wells, and the amount of irrigated

acreage. (Wat. Code, § 10933(b).) For all medium- and high-priority basins, SGMA tasked local GSAs with developing and adopting GSPs that would achieve groundwater sustainability within 20 years and prevent "undesirable results." The six undesirable results under SGMA are: (1) chronic lowering of groundwater levels; (2) significant and unreasonable reduction of groundwater storage; (3) significant and unreasonable seawater intrusion; (4) significant and unreasonable degraded water quality; (5) significant and unreasonable land subsidence; and (6) depletion of interconnected surface water. (Wat. Code, § 10721(x)(1)-(6).)

DWR is responsible for reviewing each GSP to determine whether it complies with SGMA and is likely to achieve the sustainability goal for the basin. If DWR determines that a GSP is "adequate," the GSA may proceed with implementation and provide annual progress reports. An "incomplete" determination means the GSP has one or more deficiencies or information gaps that must be corrected before it can be approved. However, if DWR determines that the GSP is "inadequate" due to deficiencies that cannot be corrected in a timely manner, the State Water Board may hold a hearing to evaluate whether the basin should be put on "probationary" status. Once a basin is deemed probationary, the State Water Board can implement its own interim plan and impose reporting and fee requirements on groundwater extractors in the basin.

The Tule Subbasin

The Tule Subbasin (Basin No. 5-22.13), which underlies a portion of the San Joaquin Valley in Tulare County, is a critically overdrafted, high-priority basin. In January 2020, seven GSAs submitted six GSPs to coordinate the sustainable management of the Tule Subbasin. After DWR determined that the 2020 GSPs were incomplete, the GSAs submitted revised GSPs on January 27, 2022, which DWR deemed inadequate a year later. After DWR's determination, the State Water Board scheduled a public hearing to determine whether the Tule Subbasin should be assigned probationary status. On March 8, 2024, the State Water Board released a draft staff report recommending probation and the imposition of reporting and fee requirements. Prior to the hearing date, the State Water Board received public comments on the draft staff report and the Tule Subbasin GSAs submitted further revised GSPs.

Probationary Hearing

Under SGMA, the State Water Board shall:

> . . .exclude from probationary status any portion of a basin for which a groundwater sustainability agency demonstrates compliance with the sustainability goal. (Wat. Code, § 10735.2(e).)

This provision of SGMA is commonly referred to as the "good actor" provision. Separate from the good actor provision, the State Water Board has the discretion to exclude a class or category of extractors from the reporting and fee requirements of a probationary basin if they are subject to a local plan or program that adequately manages groundwater, or they are likely to have a minimal impact on basin withdrawals. (Wat. Code, § 10735.2(c).) The draft staff report did not recommend any probation exclusions, finding the 2022 GSPs had inadequacies that prevented compliance with the sustainability goal. Similarly, the draft staff report did not recommend any reporting or fee exclusions, due to overdraft conditions in the basin.

At the September 17, 2024 hearing, multiple GSAs and groundwater users had submitted comments and requests for reconsideration of the applicability of the good actor provision and the reporting and fee exclusions. The Final Staff Report did not change its position on probation exclusion, though it recommended that extractors in Kern-Tulare and DEID be excluded from the requirements to report extractions and pay fees, contingent on their continued adequate management and progress to achieve sustainability. The State Water Board agreed with the Final Staff Report's recommendation, finding that DEID and Kern-Tulare are "net-rechargers" of groundwater (meaning they add more groundwater than they remove) and have maintained balanced water budgets within their management areas.

The Pixley Irrigation District GSA and the Lower Tule Irrigation District GSA also requested reporting and fee exclusions at the hearing, citing their revised GSPs and recent actions to improve groundwater management. The State Water Board denied both requests but stated it would review the updated GSPs and reconsider its decision in the coming months.

Conclusion and Implications

To regain local control in the Tule Subbasin, the GSAs will need to demonstrate compliance with the sustainability goal of their coordinated GSPs. As for other basins in the state, probationary hearings for the Kaweah and Kern County subbasins will be held in early 2025, while actions related to the probationary designation of the Tulare Lake Subbasin have been suspended due to pending litigation. A copy of the Final Staff Report and Probationary Resolution for the Tule Subbasin can be found here: https://www.waterboards.ca.gov/water_issues/programs/sgma/groundwater_basins/tule-subbasin.html.
(Jake R. Voorhees, Austin C. Cho)

THE DELTA CONVEYANCE PROJECT: AN UPDATE ON SCHEDULE AND NEXT STEPS

Much has been written about the Delta Conveyance Project (DCP) and its prior iterations over the years including in this publication. The preceding and upcoming months present circumstances calling for an update as the DCP relates to the water rights petition proceeding pending before the State Water Resources Control Board (State Water Board). As discussed more below, the hearing date remains set to begin January 16, 2025, though various dates have been vacated leading up to January with a second pre-hearing conference set for October 17, 2024.

Background

The DCP is the fourth iteration dating back decades to create a massive water conveyance system for water to move from northern regions of the state of California to areas south of the Sacramento-San Joaquin River Delta (Delta). The most recent iteration of this large water project was California Water Fix, and prior to that project iteration was the Bay Delta Conservation Plan and the Peripheral Canal. The price tags of course vary with each new project iteration, with the DCP's cost estimated at $15 billion.

The project seeks to build a 36-foot diameter tunnel in the Delta to carry fresh water from the Sacramento River southward and under the Delta to a network of reservoirs, canals, pipelines, and other water conveyance infrastructure. The DCP is scaled down from the Water Fix version by being a single concrete tunnel about 150 feet underground though two large intakes would be constructed to feed the tunnel.

Project Status at the State Water Resources Control Board

DWR submitted a petition to the State Water Board in February 2024 to request a change in point of diversion for the existing State Water Project water rights. The petition seeks to divert water under existing water rights from two new locations in the Delta.

Following the August 13 pre-hearing conference, various dates previously scheduled have been vacated, including the December 4, 2024, deadline for submission of case-in-chief exhibits with a new deadline said to be set no sooner than January 10, 2025.

The October 17 pre-hearing conference notice provides an agenda for: (1) rendering a decision on DWR's August 23 request; (2) consideration of DCP change petitions separately from time extension petitions; and (3) staggering deadlines for submission of case-in-chief exhibits. Notices of intent to participate and any pre-hearing conference statements are due by October 10, 2024.

Key Procedural Issues for the October 17, 2024, Pre-Hearing Conference

The key procedural issues are:

- Expired Deadline for Beneficial Use: Legal questions about the significance of the expiration of time for the Department of Water Resources (DWR) to divert and beneficially use water under the specified water right permits.

- Scope of the Proceeding on DWR's Petitions for Change: Whether the State Water Board should consider the change petitions separately from petitions for an extension of time to divert and beneficially use water under the subject permits. If considered separately, how the Board should address potential outcomes of future-filed time extension petitions and condition any approval of the DCP change petitions.

• August 23 Request for Minor Change: Objections to DWR's request to amend the DCP change petitions, including procedural flaws and the appropriateness of seeking a 55-year extension of the construction deadline as a "minor change."

Each of these issues deserve robust discussion beyond what is written here. DWR seeks to amend the DCP change petitions to modify Term 6 of the referenced permits, extending the construction deadline from December 31, 2000, to December 31, 2055. The request appears procedurally flawed because the cited Water Code sections (1700.4 and 1700.6) authorize minor changes to water right applications, permits, and licenses, but not to change petitions. A 55-year extension does not seem to qualify as a "minor adjustment" to papers already submitted.

Conclusion and Implications

DWR's August 23 Request introduces significant procedural and legal complexities that the State Water Board must address to ensure a fair and efficient hearing process.

The resolution of these issues will likely affect the scope, schedule, and conditions of the hearing on the DCP change petitions. The hearing officer may need to stagger the deadlines for submission of case-in-chief exhibits and hearing days, allowing DWR to present its case-in-chief before protestants submit and present their cases-in-chief. If the Board decides to consider the DCP change petitions separately, it must determine how to condition any approval to ensure that diversion or rediversion of water through the proposed DCP is limited to the amount of water that DWR put to beneficial use by the 2009 deadline, unless and until the Board approves petitions for an extension of time. Accordingly, the October 17 pre-hearing conference presents very significant legal and factual issues for discussion that will shape, or re-shape, the State Water Board's hearing process for the DCP.
(Wes Miliband)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT AGREES TO HEAR CHALLENGE TO SAN FRANCISCO WATER QUALITY STANDARDS

City and County of San Francisco v. U.S. Environmental Protection Agency, Case No 23-753.

The U.S. Environmental Protection Agency (EPA) is facing a legal challenge from San Francisco (City) regarding its water quality standards, specifically in relation to a federal Clean Water Act permit for the City's Oceanside combined sewer system and wastewater treatment facility. The EPA's narrative standards, a key feature of the permit, are being contested by the City on the grounds of vagueness, as San Francisco argues that these standards make it difficult for the City to comply with specific water quality expectations. However, California, along with several environmental advocacy groups, is supporting the EPA, asserting that these narrative standards are essential for effective environmental regulation. The case is currently before the U.S. Supreme Court, with oral argument scheduled for October 16. The grant of review stems from the Ninth Circuit Court of Appeals.

The EPA's Narrative Standards under Scrutiny

San Francisco's challenge revolves around the permit's inclusion of narrative effluent limitations. These limitations are broader, descriptive requirements that restrict what a permit holder, such as the City, can discharge into a jurisdictional body of water. According to San Francisco, while it does not oppose the idea of narrative standards in principle, it takes issue with the responsibility imposed on permit holders for the overall quality of receiving waters—a mandate the City claims is too ambiguous.

The City argues that these vague standards create compliance difficulties, as they lack the precision of specific effluent limitations, which are numeric restrictions on the concentration of pollutants a facility can release. Without clear guidelines, San Francisco contends, it is challenging to ensure adherence to the requirements set forth in the Clean Water Act (CWA).

California's Support for the EPA

In an *amicus* brief supporting the EPA, the California Department of Justice countered San Francisco's claims, arguing that narrative standards are not only legally valid but also crucial in some cases to meet water quality goals. According to California, it is impractical, if not impossible, to codify every water quality standard into precise numeric effluent limitations for every facility. As a result, narrative standards provide a necessary and flexible tool for regulators to ensure that water quality objectives are met, even when numeric standards are difficult to apply.

California's argument emphasizes that if the U.S. Supreme Court sides with San Francisco and strikes down the narrative standards, a vital regulatory tool will be lost. This would, in the state's view, undermine the ability of permitting authorities to enforce the CWA effectively. California's position underscores the importance of maintaining regulatory flexibility in safeguarding water quality, particularly when the complexity of environmental factors cannot be reduced to simple numbers.

Environmental Groups Rally Behind the EPA

In addition to California's support, several environmental organizations, including the Natural Resources Defense Council, San Francisco Baykeeper, and the Sierra Club, have submitted a joint amicus briefs urging the Court to uphold the EPA's narrative standards. These groups argue that San Francisco's challenge introduces legal arguments that distort the CWA's intent and undermine the efficacy of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program.

The environmental organizations maintain that Congress, when crafting the CWA, established a comprehensive permitting system that should not be subject to reinterpretation based on undefined legal

terms. They argue that the City's effort to undermine the narrative standards could have far-reaching consequences for water quality management nationwide. By potentially narrowing the scope of permissible regulatory tools, San Francisco's legal challenge risks destabilizing the "carefully calibrated regime" the CWA seeks to achieve in protecting the environment from pollutant discharges.

The EPA's Defense and Legal Precedent

In response to San Francisco's claims, the EPA has defended its use of narrative standards, pointing to established legal precedent and statutory interpretation. The agency has argued that its authority under the CWA extends beyond merely imposing effluent limitations, as evidenced by prior U.S. Supreme Court precedent affirming that the EPA's regulatory authority includes imposing discharge limitations beyond the narrow statutory definition of "effluent limitations."

The EPA contends that the language of the CWA explicitly allows for discharge limitations beyond effluent limitations and that this interpretation has been a longstanding part of the agency's approach to implementing the law. The agency further argues that compliance with numeric effluent limitations alone will not always suffice to achieve a state's water quality standards, thus reinforcing the need for narrative standards in certain regulatory scenarios.

Potential Impact of the Supreme Court's Ruling

The outcome of this case has significant implications not only for San Francisco, but also for the future of water quality regulation across the United States. If the Supreme Court sides with San Francisco and strikes down the EPA's use of narrative standards, the decision could constrain the regulatory tools available to both federal and state agencies under the CWA. This would make it more challenging to address complex water quality issues that do not lend themselves to numeric limitations alone.

Conversely, if the Court upholds the EPA's standards, San Francisco argues that it could expose permittees to unpredictable and costly penalties. "For municipalities like San Francisco, the cost of injunctive relief in CWA enforcement cases can often run into the hundreds of millions or even billions of dollars," and with the narrative standards established under its recent permit, the City argues that it can have little certainty about whether or not its conduct will expose the municipality to such actions.

Conclusion and Implications

The legal battle between San Francisco and the EPA over water quality standards highlights a critical tension in environmental regulation: the balance between precision and flexibility. As San Francisco challenges the vagueness of narrative standards and the potentially costly consequences of its flexibility, California and environmental groups emphasize the necessity of these standards for effective water quality management. With the U.S. Supreme Court set to weigh in, the case could set an important precedent for how the CWA is applied moving forward, determining the future of water quality protections and regulatory enforcement in the U.S.
The Brief for the Respondent is available here: https://www.supremecourt.gov/DocketPDF/23/23-753/323429/20240826212335332_23-753bsUnited-States.pdf

The Reply Brief for Petitioner is available here: https://www.supremecourt.gov/DocketP DF/23/23-753/326883/20240925173628062_23-753%20Reply%20Brief.pdf

(Sam Bacal-Graves, Meagan J. Somogyi, Breana Inoshita)

RECENT FEDERAL DECISIONS

EPA'S DECISION TO PURSUE NON-REGULATORY ACTION REGARDING CAFOS UPHELD BY NINTH CIRCUIT

Food & Water Watch, et al. v. U.S. Environmental Protection Agency, Unpub., Case No. 23-2146 (9th Cir. Oct. 2, 2024).

In October, the Ninth Circuit Court of Appeals, in an *unpublished* decision, denied a petition for review regarding the U.S. Environmental Protection Agency's (EPA) decision to deny a petition to initiate rulemaking related to regulations governing concentrated animal feeding operations (CAFOs). The EPA instead proposed to undertake review of existing regulations and the viability of non-regulatory actions to address pollution attributable to CAFOs.

Background

Congress enacted the Clean Water Act in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The CWA in part regulates the discharge of dredged or fill material into navigable waters. In the context of the CWA, the term "navigable waters" is defined as "waters of the United States." 33 U.S.C. § 1362(7). The CWA prohibits the discharge of any pollutant by any person into waters of the United States without a permit. 33 U.S.C. § 1311(a).

Animal Feeding Operations (AFOs) are agricultural operations where animals are kept and raised in confined situations. An AFO is a lot or facility (other than an aquatic animal production facility) where the following conditions are met: (1) animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (2) crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

AFOs that meet the regulatory definition of a concentrated animal feeding operation (CAFO) are regulated under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program. The NPDES program regulates the discharge of pollutants from point sources to waters of the United States. CAFOs are point sources, as defined by the CWA. To be considered a CAFO, a facility must first be defined as an AFO, and meet the criteria established in the CAFO regulation.

Petitioners Food & Water Watch and twelve other environmental nonprofits (Petitioners) petitioned the United States Environmental Protection Agency (EPA) to initiate a rulemaking and revise its regulations governing CAFOs that discharge animal waste and manure into U.S. waterways, pursuant to EPA's authority under the CWA. Petitioners alleged that CAFOs were responsible for ongoing and unlawful water pollution.

The Ninth Circuit's Decision

As a threshold matter, EPA agreed with Petitioners that CAFOs may be responsible for unlawful water pollution, but it determined that an immediate, multipronged rulemaking may not be the best way to fix the problem. Instead, EPA decided that it would do two things: (1) convene a committee of stakeholders to solicit insights into the problem and (2) initiate a study addressing the efficacy of its current regulations. After conducting these measures, EPA would assess whether it could address water quality concerns related to CAFOs through improvements to implementation, enforcement, and other non-regulatory initiatives, or whether regulatory revisions are appropriate. However, Petitioners were dissatisfied with EPA's response.

As identified by the court, petitioners focused their challenge on three specific issues, which they presented to EPA in their petition and to which EPA responded in detail. Specifically, Petitioners alleged that: (1) EPA had lax requirements for CAFOs with National Pollutant Discharge Elimination System (NPDES) permits; (2) EPA's CAFO program, which allows most discharging CAFOs to avoid permit coverage, was inadequate; and (3) EPA's broad agricultural stormwater exemption independently prevents adequate regulation of CAFOs.

The Ninth Circuit held that EPA did not act unreasonably when it refused to take petitioners' requested action to further regulate CAFOs. An agency action may be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, the court's review is extremely limited and highly deferential. According to the court, an agency action qualifies as arbitrary or capricious if it is not reasonable and reasonably explained. In other words, an agency cannot simply ignore an important aspect of the problem; it must offer a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

In this instance, as explained by the court, EPA acknowledged the serious problem of CAFO-based waste discharges into U.S. waterways, and it decided that the most effective way to counter the problem is to further study its Effluent Limitation Guidelines and to commission a stakeholders' subcommittee.

Accordingly, the Ninth Circuit held that the EPA did not refuse to taken any action with respect to its CAFO regulations. The court thus distinguished this case from others where the EPA wholly declined to act. The court further observed that the EPA has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities and significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. The court therefore concluded that EPA deemed it prudent to first seek information about how best to tackle the problem before directing resources toward a new rulemaking. Those justifications, in the view of the court, were reasonable and not at odds with the CWA's requirements.

Conclusion and Implications

This case reflects that federal courts, at least the Ninth Circuit, remain willing to defer to agency actions where the agency has directly engaged with the issue at hand and not completely avoided considering it. Whether federal courts continue to defer to agency actions around rulemaking issues post-overturning of *Chevron* deference remains to be seen, but in this instance the agency's decision not to engage in a rulemaking process and to instead look to non-regulatory actions may suggest that federal agencies will pursue non-rulemaking actions where possible to enforce existing regulations rather than risk enacting rules to which federal courts are no longer required to defer. The Ninth Circuit's *unpublished* decision available at https://cdn.ca9.uscourts.gov/datastore/memoranda/2024/10/02/23-2146.pdf
(Miles Krieger)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT UPHOLDS USE OF CEQA CATEGORICAL EXEMPTION FOR CONVERSION OF OIL WELL TO INJECTION WELL

Sunflower Alliance v. California Department of Conservation, ___Cal.App.5th___, Case No. A167698 (1st Dist. Sept. 6, 2024).

In *Sunflower Alliance v. California Department of Conservation*, the First District Court of Appeal found that substantial evidence supported the California Department of Conservation's Division of Geologic Energy Management's (CalGEM's) determination that converting a former oil well into an injection well constituted a negligible expansion of use and therefore fit within CEQA's Class 1 categorical exemption. The Court of Appeal held that a project is not automatically disqualified from the categorical exemption by any new use but instead depends on whether the change in use, and the environmental risks of the change, are negligible.

Factual and Procedural Background

In 2020, Reabold California LLC filed an application with the Department of Conservation's Division of Geologic Energy Management (CalGEM) to convert a former oil well in Contra Costa County into a Class II injection well. The well was drilled in 1963 and operated for over 20 years before it was plugged. Reabold operates two nearby oil wells that produce about 300 barrels of water per day. Currently, the produced water is transported to a disposal site 32 miles away, which requires ten truck trips per week. Reabold intends to use the proposed injection well to eliminate those trips.

The application proposed minor changes to the existing injection site, including removal of the well plug, installation of injection equipment inside the well, and use of the existing well pad and access road. The application was reviewed by CalGEM, the State Water Resources Control Board, and the Regional Water Quality Control Board. Reabold submitted a technical report from an engineer, a geologist, and a hydrologist, which concluded that the injected water would be confined to the aquifer by a barrier of about 1,000 vertical feet of shale. The agencies ultimately approved the application.

Regarding the California Environmental Quality Act (CEQA), CalGEM found that the project fit within the Class 1 categorical exemption (CEQA Guidelines, § 15301) as a "minor alteration" of an existing facility involving "negligible or no expansion" of a well's former use. CalGEM had previously promulgated a regulation determining that minor well conversions and injections may fall within the Class 1 exemption, based on a case-by-case and fact-intensive inquiry. In this case, CalGEM noted that the injection equipment would be installed within the existing well boring and would require no significant surface equipment or new drilling. In addition, the project would eliminate the need for routine trucking of produced water from Reabold's active wells.

At the Trial Court

Sunflower Alliance filed a petition for writ of mandate challenging CalGEM's use of the categorical exemption. The trial court held that, despite the fact that the physical modifications to the well would be minor and fit within the exemption, the exemption did not apply because injection, rather than extraction, is a "significantly different use." The court entered judgment in favor of Sunflower Alliance and issued a peremptory writ of mandate directing CalGEM to set aside its approval of the project. CalGEM complied with the writ, and Reabold appealed.

The Court of Appeal's Decision

The First District Court of Appeal reversed, holding that well conversion projects are not inherently outside of the Class 1 exemption's scope. In reviewing CalGEM's decision to apply the exemption, the court considered whether the agency abused its discretion in determining that the exemption applied to this project, and whether substantial evidence in the record supported the decision.

First, the court considered whether well conversion projects, as a group, are beyond the exemption's scope. Sunflower Alliance argued that any new use of a modified well is an impermissible expansion. On the other hand, Reabold argued that the applicability of the exemption instead depends on the degree of change; here, since the change essentially just reverses the process, the degree of change is insignificant.

The court did not fully agree with either approach. To determine the applicable rule, the court looked to CEQA's plain language to conclude that the exemption does not inherently bar any new use. Instead, the court interpreted the exemption to allow changes or expansions in use that are inconsequential, and to exclude changes in use that threaten environmental harm. In other words, a "change in use is unimportant, as far as CEQA goes, if the risk of environmental harm from the new use is negligible." The court supported this interpretation of the Guidelines by considering the fundamental purpose of categorical exemptions, which is to exclude from CEQA review certain classes of projects that have been determined to not have significant environmental impacts.

Based on this interpretation, the court found that the project fit within the Class 1 categorical exemption because it only included "minor alterations" to "existing equipment." The court reiterated that conversion to an injection well requires minor alterations to the existing well, and no significant changes to existing roads, the well pad, or surrounding vegetation. Further, the court found that the change in the well's use was negligible, since the well formerly pumped oil and water from an exempt aquifer, and it would simply inject water into the same aquifer. Part of CalGem's regulatory determination in approving the site as a Class II well is ensuring that the injected water cannot escape the aquifer and harm people, property, or the environment. Based on this determination, the court concluded that the environmental risks of the conversion are negligible.

The Court of Appeal then rejected Sunflower Alliance's argument that substantial evidence did not support CalGEM's decision to apply the categorical exemption to the project. The court pointed out that Sunflower Alliance did not dispute any particular findings or argue that the agency made a mistake, but instead "briefly raised concerns that there 'may' be significant adverse impacts although it is 'unclear.'" The court first rejected Sunflower Alliance's concern about the injected water's impact on the aquifer's water quality, finding no evidence in the record of negative effects on the already poor-quality water in the aquifer. The court then found that Sunflower Alliance had no basis to question the agencies' technical conclusions in determining that the injected fluids would not escape from the aquifer. Therefore, the court concluded that substantial evidence supported CalGEM's determination that the project fit within the Class 1 exemption.

Lastly, the court rejected Sunflower Alliance's argument that CalGEM improperly imposed mitigation measures to eliminate the project's alleged environmental impacts. CalGEM adopted several conditions in approving the well, which Sunflower Alliance asserted were mitigation measures used to mitigate the project into the categorical exemption. The court stated that the conditions and regulations that Sunflower Alliance pointed to were imposed in response to CalGEM's standard that it usually required for permit issuance. Compliance with these standards is a legally mandated element of the project, not a CEQA measure to lessen the project's environmental impact in order to fit within a categorical exemption.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies its approach to analyzing whether and how a proposed project qualifies for CEQA's Class 1 categorical exemption. The court emphasized relying on the plain language of Guidelines section 15301 and adhering to the exemption's underlying purpose in interpreting its requirements. Ultimately, the court found that the relevant inquiry is whether a proposed change and the environmental impacts of that change are negligible, and it rejected the contention that the Class 1 categorical exemption inherently does not apply to any new proposed use. The First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/A167698.PDF.

(Hannah Rider, Bridget McDonald)

SONOMA SUPERIOR COURT FINDS COUNTY GROUNDWATER WELL ORDINANCE NONCOMPLIANT WITH CEQA AND PUBLIC TRUST DOCTRINE

Russian Riverkeeper, et al. v. County of Sonoma, Case No. SCV-273415 (Sonoma Super. Ct.).

Sonoma County Superior Court recently issued a ruling against Sonoma County for its groundwater management practices. As a result of the ruling, Sonoma County will be required to revise its Well Ordinance to align with CEQA and the Public Trust Doctrine to better manage groundwater in the County.

Background

Sonoma County is home to Sonoma Valley, which is considered the birthplace of the California wine industry. The County is home to some of the earliest vineyards and wineries. Over the past several decades, the County has experienced significant population growth and land use changes, including increases in irrigated agriculture, primarily vineyards. These changes have increased demands on water and groundwater resources, and groundwater levels are reported to be declining in portions of the valley.

Many vineyard owners and farmers in Sonoma County rely on historic water rights to irrigate their crops, especially during droughts. These rights, often established decades or even centuries ago, grant priority access to water for beneficial use. Groundwater tables have reportedly declined by several hundred feet over a period of many years, now reaching as deep as 500 to 600 feet below ground surface.

The Court's Decision

In a case filed but the California Coastkeeper Alliance (CCKA) and Russian Riverkeeper, the plaintiffs argued that the Well Ordinance adopted by the County in April 2023 allowed groundwater pumping without sufficient environmental protections. The Sonoma Superior Court agreed and held that well ordinance that inadequately safeguarded local waterways. The court held that the County violated both the Public Trust Doctrine and the California Environmental Quality Act (CEQA).

The Public Trust Doctrine is a common law doctrine that protects sovereign lands for the benefit, use and enjoyment of the public. The Public Trust provides that tide and submerged lands and the beds of lakes, streams and other navigable waterways are to be held in trust by the State for the benefit of the people of California. CEQA also focuses on maintaining environmental sustainability by requires that state and local agencies disclose and evaluate the significant environmental impacts of proposed projects and adopt all feasible mitigation measures to reduce or eliminate those impacts.

Analysis under the *Environmental Law Foundation* Decision

The Superior Court found precedent in the 2018 decision in *Environmental Law Foundation v. State Water Resources Control Board*, where the California Court of Appeal ruled that groundwater extraction affecting a navigable waterway must comply with the Public Trust Doctrine. Specifically, the court held that the priority access granted to vineyard and landowners for beneficial use of groundwater does not usurp public rights. The court emphasized that all water usage, even under historic rights, must be sustainable and not harm public resources like rivers and fish habitats.

Conclusion and Implications

This ruling could result in stricter regulations to groundwater extraction for vineyard owners and farmers, which could potentially lead to increased costs for vineyards, especially during critical growing seasons.

Sonoma County will be required to revise its Well Ordinance to align with CEQA and the Public Trust Doctrine. This will involve conducting thorough environmental reviews before issuing new groundwater permits and ensuring all actions taken protect the county's water resources from over-extraction.

The court's recent ruling will likely catch attention statewide, as groundwater management has taken hold through the Sustainable Groundwater Management Act of 2014. The ruling may shape the

manner in which counties and Groundwater Sustainability Agencies interact. The ruling could result in additional costs to vineyard owners and farmers that are already largely burdened by increasingly complex groundwater regulation.
(Christina Suarez, Derek Hoffman)

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